(41)

No. 95-2074

Supreme Court, U.S.
FILED
AUG 23 1996
CLERK

In The

Supreme Court of the United States

October Term, 1995

CITY OF BOERNE, TEXAS,

Petitioner,

vs.

P.F. FLORES, ARCHBISHOP OF SAN ANTONIO, AND UNITED STATES OF AMERICA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF AMICUS CURIAE OF THE COALITION FOR THE FREE EXERCISE OF RELIGION, AMICUS CURIAE, IN SUPPORT OF RESPONDENT FLORES

EDWARD MCGLYNN GAFFNEY, JR.
Valparaiso University School of Law
Wesemann Hall
Valparaiso, IN 46383
219-465-7834 FAX: 219-465-7872
* *Counsel of Record*

STEVEN T. MCFARLAND
Christian Legal Society
4208 Evergreen Lane, Suite 222
Annandale, VA 22003
703-642-1070 FAX: 703-642-1075

MARC STERN
American Jewish Congress
15 E. 84th Street
New York, NY 10028
212-360-1545 FAX: 212-249-3672

Attorneys for Amicus Curiae

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

20 pp

Of Counsel:

RICHARD FOLTIN
Counsel, American Jewish Committee
1156 Fifteenth Street, NW
Washington, DC 20005
202-785-4200

ELLIOT MINCBERG
Legal Director, People for the American Way
2000 M Street, NW
Washington, DC 20036
202-467-4999

FOREST MONTGOMERY
National Association of Evangelicals
1023 Fifteenth Street, NW
Washington, DC 20005
202-789-1011

DAVID SAPERSTEIN
Counsel, Union of American Hebrew Congregations
2027 Massachusetts Avenue, NW
Washington, DC 20036
202-387-2800

OLIVER THOMAS
Special Counsel, National Council of Churches
of Christ in the U.S.A.
110 Maryland Avenue, NE
Washington, DC 20002
423-977-9046

J. BRENT WALKER
General Counsel, Baptist Joint Committee
on Public Affairs
200 Maryland Avenue, NE
Washington, DC 20002
202-544-4226

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STATEMENT OF INTEREST

The Coalition for the Free Exercise of Religion ("Coalition") is a group of over sixty religious and civil liberties organizations. The religious organizations in the Coalition represent the spectrum of religious diversity in America – Christians, Jews, Moslems, Native Americans, and Sikhs. The beliefs and practices of the religious communities in the Coalition are as diverse as the population of the Nation. The Coalition includes liberals and conservatives, and groups with world views as disparate as People for the American Way and Traditional Values Coalition. We disagree profoundly with one another about many of our most cherished traditions and beliefs. But one of the things that unifies all of us even more profoundly is our commitment to the protection of religious freedom as the first of our civil liberties.[1] We are united by the conviction that the protection of religious freedom is essential for the well-being of American society. The members of the Coalition participating in this brief are listed in Appendix A.

After this Court's decision in *Employment Division v. Smith*, 494 U.S. 872 (1990), the Coalition sought from Congress remedial legislation that would secure religious freedom more adequately than under the standard

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[1] For an elegant statement of the primacy of the Religion Clauses of the First Amendment in our constitutional values, *see The Williamsburg Charter*, 8 J. LAW & RELIG. 5-22 (1990); for a study of the fragility of this constitutional value, *see* John T. Noonan, Jr., *The End of Free Exercise?*, 42 DEPAUL L. REV. 567 (1992).

announced in *Smith*. We vigorously advocated the passage of the Religious Freedom Restoration Act ("RFRA"), and we act now in unison with the United States to support the constitutionality of RFRA whenever it is challenged by state and local authorities. The Coalition takes no position whatever on the merits or on any disputes between or among the parties. This brief addresses only the question whether RFRA is a legitimate exercise of congressional power.

The letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court pursuant to Rule 37.3.

ARGUMENT

I. Religious Communities Cannot Maintain their Beliefs and Practices Free from Governmental Interference as Long as the Religious Freedom Restoration Act Remains Under a Constitutional Cloud.

This case comes to this Court in an unusual posture. Both petitioner and respondent urge the Court to grant certiorari, notwithstanding the fact the respondent prevailed in the court of appeals. By the same token, the Coalition fully supports the decision of the court of appeals, but also urges that the Court take this case. A prompt decision by this Court on the constitutionality of RFRA is crucial to protecting the religious freedom of all Americans and is fully warranted under the Court's standards for reviewing the constitutionality of acts of Congress.

On the day the Court decided to alter its free exercise jurisprudence in *Employment Division v. Smith*, 494 U.S. 872 (1990), it was immediately apparent to the members of this Coalition that we need greater protection for religious freedom than is provided by the rational basis standard announced by the Court in *Smith*. For one thing, *Smith* escalated the level of proof that we would have to demonstrate before receiving meaningful judicial protection from oppressive governmental regulation. Before *Smith* the government was required to demonstrate that its interest in a case involving deeply held religious beliefs and practices was truly compelling. As the Court announced in *Sherbert v. Verner*, 374 U.S. 398 (1963): "It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, 'only the gravest abuses [by religious claimants], endangering paramount interests, give occasion for permissible limitation [on the free exercise of religion].'" 374 U.S. at 406 (quoting *Thomas v. Collins*, 323 U.S. 516, 530 (1945)); *see also Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972). After *Smith* and before RFRA, religious claimants were required to demonstrate intentional or purposeful discrimination against a religious body before they could avail themselves of the compelling interest standard.

We appreciate the value of neutrality that the Court announced as central to free exercise jurisprudence in *Smith*; *see also Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). But whether subtle or overt, inadvertent or intentional, violations of free exercise of religion can be masked under the category of facially neutral, generally applicable norms about public

health, welfare, or safety. For example, the general rule about availability of evidence in a criminal prosecution can be stated in a facially neutral way: the government is entitled to relevant and probative evidence. But since the earliest days of the Republic this broad rule has – for profound reasons of constitutional dimensions – admitted of a very important exception that protects against the use of the clergy as agents of the government. *See, e.g., Trammell v. United States*, 445 U.S. 40, 51 (1980) (dictum); Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise*, 103 Harv. L. Rev. 1409, 1410-12 (1990); Michael Plantamura, "Clergyman-Penitent Privilege," in Scott Stone and Ronald Liebman eds., *Testimonial Privileges* 359-76 (1983); James A. Serritella, "Confidentiality, the Church, and the Clergy," *Proceedings of the Forty-Eighth Annual Convention of the Canon Law Society of America* 83-93 (1986); and John C. Bush and William Harold Tiemann, *The Right to Silence: Privileged Clergy Communication and the Law* (3d ed. 1989). Rejecting this long-standing and virtually universal practice of the states, the District Attorney of Lane County, Oregon – a jurisdiction that does not currently have a statute expressly protecting the confidentiality of communications between clergy and penitents – recently ordered the surreptitious recording of a sacramental confession by a penitent to a priest while the penitent was in custody. After vigorous protest by church leaders and civil libertarians, the prosecutor announced that he would not use the tape in court and that he would support legislation prohibiting the use of such evidence in his state. "Apology For Taping Inmate's Talk," *New York Times*, A-16, May 24, 1996. In the Oregon case the government yielded to

political pressure, but more frequently religious groups have little or no influence over elected officials accustomed to granting no exceptions to the uniform enforcement of the law.[2] Without RFRA, ancient religious practices long revered in this country can easily be eroded under the rubric of a generally applicable, facially neutral rule; and the level of generality of the governmental interest can easily be manipulated by an attorney for the government. The statutory safeguard afforded by RFRA is necessary, then, to avoid outrageous violations of free exercise such as that contemplated by the District Attorney in Oregon.

We struggle with the issue of the constitutionality of RFRA continuously. Because attorneys for state and local governments have subjected RFRA to relentless attack, we must litigate the constitutionality of this act of Congress over and over again. Every time we advise a client, whether a church or an individual believer, prudence dictates that we warn the client that the government may claim that RFRA is unconstitutional and that this claim has not yet been definitively resolved. The cloud that continues to hover over the constitutionality of RFRA thus impedes the effectiveness of an act of Congress that

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[2] The City of Boerne did not try to accommodate the religious needs of the Roman Catholic parishioners here, but forced Archbishop Flores into court to seek a judgment enforcing rights secured under RFRA. This governmental refusal to accommodate religious interests is reflected by governmental units in most of the cases litigated under RFRA, as well as in countless unreported cases in which members of the Coalition have given counsel to believers and their communities.

is entitled to a presumption of constitutionality, *United States v. National Dairy Products*, 372 U.S. 29, 32 (1963). Unless this cloud of unconstitutionality is removed from RFRA, the statute will not have the full operational effect designed by Congress, for the lower courts will follow the doctrine of *Ashwander v. TVA*, 297 U.S. 288 (1936) (to avoid a holding of unconstitutionality, an act of Congress may be construed narrowly), and will continue to produce cases such as *Smith v. Fair Employment and Housing Commission*, 12 Cal. 4th 1143, 913 P. 2d 909 (1996), cert. pending, No. 96-31, and *Swanner v. Anchorage Equal Rights Commission*, 874 P. 2d 274 (Alaska 1994), cert. denied, 115 S. Ct. 460 (1995), where the statute has been mangled into unrecognizable forms.[3] Only this Court can resolve the lingering doubt about the constitutionality of RFRA and enable its full implementation to proceed. For these reasons we urge the Court to take this case and to sustain RFRA.

Both in our legislative efforts and in our current posture of litigation, we have remained united in a strong coalition to protect religious freedom. Our solidarity on

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[3] In *Smith v. Fair Employment and Housing Commission*, the California Supreme Court did not invalidate RFRA. Only one Justice was of that view, *Smith*, 12 Cal. 4th at 1189 (Mosk, J., concurring). Similarly, in *Swanner v. Anchorage Equal Rights Commission*, the Alaska Supreme Court did not invalidate RFRA. But in both cases, the lower courts trivialized the religious interest and dramatically escalated the statutory threshold requirement of a showing of "burden" that a religious claimant must make in a RFRA case. *Smith*, 12 Cal. 4th at 1176; *Swanner*, 874 P. 2d at 283. For an extensive discussion of burden analysis in RFRA cases, *see Mack v. O'Leary*, 80 F. 3d 1175 (7th Cir. 1996).

this issue is firm because it is our collective experience that our religious beliefs and practices are increasingly vulnerable to the insensitivity of governmental bodies who insist upon the application of burdensome governmental regulations to religious organizations, without regard for the fundamental significance of religious freedom in our constitutional order. *See West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943).

In this environment, all religious communities suffer equally. In our national imagery the bell is typically a symbol of human freedom. It rings to proclaim justice in the land. But it can also toll slowly to signalize communal grief at a loss or a death. As John Donne taught us centuries ago, "Ask not for whom the bell tolls; it tolls for thee."

When a religious belief is stifled by bureaucracy, that is a kind of dying that affects us all. When, as here, a Roman Catholic Archbishop is told by a municipality that he and his community may not build a church sufficiently large to afford his fellow Catholics an opportunity to worship as the canons of their church require, that is a kind of dying that causes concern and even grief for us all. And when a federal district court tells this Archbishop that Congress and the Chief Executive exceeded their constitutional authority when they enacted RFRA, that too is a death knell for religious freedom. By contrast, when the court of appeals reverses that district court and sustains RFRA, the bell of freedom peals crisply for all of us, who are free to worship God according to the dictates of conscience. What troubles us most in this long interim between the enactment of RFRA and the present moment is the uncertainty about the ringing of

the bell. We know the difference between peals of joy and a death knell, and we never know whether a court is going to order the one or the other. Respondent Flores notes that no appellate court has yet invalidated RFRA, but lower courts have frequently held that RFRA is constitutionally infirm. In this atmosphere of uncertainty, the time is ripe for this Court to resolve this issue definitively.

As suggested both by the facts in this record and by the story referred to above about the intention of a prosecutor to use a sacramental confession in a homicide case, the kinds of harms we have experienced in this period after the enactment of RFRA go to the very heart and soul of our identity and mission as religious communities. Nothing symbolizes the current state of hostility toward religious communities more virulently than the rash of burnings of churches, principally of African-Americans, that has recently scarred our nation's history. Along with right-thinking persons of all faiths and of no religious faith, the Coalition emphatically rejects this violence. Although we acknowledge that this case is in no way causally related to these church bombings, the sad effect of both the bombings and the application of historical preservation ordinances to churches is the same, to deprive the faithful of a house of prayer according to the dictates of conscience. There can be no violation of free exercise of religion more obvious than governmental interference with the ability of a religious community to worship in the manner that God has enjoined. As such, this case serves as an excellent vehicle for this Court to signal its own concern for the independence of religious communities from stifling governmental control.

II. This Court Has Acted Promptly in the Past to Resolve any Doubt about the Authority of Congress to Protect Important Civil Rights, and the Court Should Take this Case to Clarify that the Religious Freedom Restoration Act is a Valid Exercise of Congressional Power to Secure the First of our Civil Liberties, Religious Freedom.

One of the prudential rules that guide the discretion of the Court as it shapes its docket is to wait for a clear conflict in authority among the courts of appeals, or between a federal court of appeals and the highest tribunal of one of the several states. Rule 10, Rules of the Supreme Court of the United States. This rule is not, however, inflexible. Respondent Flores has noted in his statement in response to the Petition for certiorari that the Court frequently reviews the constitutionality of federal statutes without waiting for a split in circuit authority. Statement of Flores at 5-6.

The Coalition notes that the Court has acted promptly to dispel doubts about important civil rights legislation in the past. For example, the Court acted with remarkable speed to sustain the Civil Rights Act of 1964 against constitutional challenges. Perhaps the most significant federal statute of this century, this legislation was not enacted swiftly or without struggle. On the contrary, the opponents of this legislation conducted the longest filibuster in the history of the United States Senate, lasting 82 working days and comprising over ten million words spread out on over 63,000 pages of the *Congressional Record*. On June 17, the Senate voted 76-18 to close off further debate. Two days later the Senate voted 73-27

to pass a compromise version of the bill that had bipartisan support from the Majority Leader and the Minority Leader. When the bill returned to the House, many members of the House were dissatisfied with the Senate version of this landmark legislation, which they viewed as weaker on key provisions. To avoid any further delay that would come from attempting to reconcile the House version and the Senate version in a conference committee, however, the House approved the Senate version of the bill on July 2, 1964. On the same day President Lyndon Johnson signed the bill into law. Pub. L. 88-352, 78 Stat. 241.

Legislative conflict and delay were met with judicial unanimity and expedition in this Court. Within days, a motel in Atlanta, Georgia, challenged the constitutionality of Title II of the new act, prohibiting racial discrimination in public accommodations. Acting Attorney General Katzenbach immediately filed a counterclaim, seeking an injunction against future violations of the act by the plaintiff. The three-judge district court empaneled to hear the constitutional challenge to the act promptly held a hearing on the requests for injunctive relief. On July 22, less than three weeks after the enactment of the legislation, the district court sustained the act, issued a permanent injunction against the motel to commence on August 11, and refused to stay the injunction. *Heart of Atlanta Motel v. United States*, 231 F. Supp. 393 (N.D. Ga. 1964).

On August 10, Justice Black, acting in his capacity as Circuit Justice, denied an application from the motel and an adjacent restaurant operated by Lester Maddox for a stay of the injunction, on the view that "a temporary

injunction against enforcement is in reality a suspension of an act, delaying the date selected by Congress to put its chosen policies into effect." Justice Black also noted that "the constitutionally chosen policies of the Act challenged in these cases are not the result of sudden, impulsive legislative action, but represent the culmination of one of the most thorough debates in the history of Congress." And he agreed with the appellants and with the Solicitor General "as to the wisdom of having the specific constitutional issues here involved decided at as early a date as orderly procedure will permit." *Heart of Atlanta Motel v. United States*, 85 S. Ct. 1, 2 (1964) (Black, J., Circuit Justice).

On the first Monday of its October Term, the Court not only noted probable jurisdiction in the case, but also granted a joint motion for acceleration of oral argument and heard the case on the very same day. *Heart of Atlanta Motel v. United States*, 379 U.S. 803 (1964). On December 14, barely five months after the legislation had been enacted, the Court issued an unanimous opinion sustaining the Civil Rights Act of 1964. *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964).

There are important differences between RFRA and Title II of the Civil Rights Act. The one protects the free exercise of religion against excessive regulation by the government; the other is aimed at the evil of discrimination on the basis of race, color, religion, or national origin, principally by private parties. But these differences are not as important as the profound similarities between these two acts of Congress. Both are instances of landmark legislation in which Congress acted affirmatively and by an overwhelming bipartisan majority to create a

statutory remedy directly aimed at securing civil liberties and civil rights more adequately than under a leading precedent of this Court, whether *Smith* or the infamous *Civil Rights Cases*, 109 U.S. 3 (1883).

We know that we will not prevail in every skirmish with state and local government over the application of RFRA to our various beliefs and practices, any more than the NAACP Legal Defense Fund is guaranteed victory in all of the litigation it has brought under federal civil rights statutes. But we urge the Court to affirm the crucial protection that religious believers and their communities now enjoy under RFRA.

We note that the rule announced in *Smith* commanded only a bare majority of the Court. *See, e.g., Smith*, 494 U.S. at 890 (O'Connor, J., concurring in the judgment). Some members of the Court may be prepared to revisit *Smith*, with a view to overruling it as a departure from sound constitutional jurisprudence. *See, e.g., Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 559 (1993) (Souter, J., concurring in part and concurring in the judgment) ("in a case presenting the issue, the Court should re-examine the rule *Smith* declared"); *see also Swanner v. Anchorage Equal Rights Commission*, 115 S. Ct. 460 (1995) (Thomas, J., dissenting from denial of certiorari) (urging adherence to compelling interest standard in RFRA).

In our view the Court should reverse *Smith*. The sooner, the better. But as long as the Court is not prepared to do so, it should at least act promptly to remove any lingering doubt that Congress acted well within its powers when it responded to *Smith* with appropriate remedial legislation to safeguard religious freedom. This

case affords the Court a clean record and a clear opportunity to signal to the Nation that it meant what it said when it sent the religious communities to the legislative branch to secure our most cherished religious beliefs and practices. *Smith, supra,* 494 U.S. at 890 ("Values that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process.").

CONCLUSION

For the foregoing reasons, the amicus respectfully requests that the petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit be granted, and that the judgment of that court be affirmed.

Respectfully submitted,

EDWARD MCGLYNN GAFFNEY, JR.
Valparaiso University School
of Law
Wesemann Hall
Valparaiso, IN 46383
219-465-7834 FAX: 219-465-7872
* *Counsel of Record*

STEVEN T. MCFARLAND
Christian Legal Society
4208 Evergreen Lane, Suite 222
Annandale, VA 22003
703-642-1070 FAX: 703-642-1075

MARC STERN
American Jewish Congress
15 E. 84th
New York, NY 10028
212-360-1545 FAX: 212-249-3672

Attorneys for Amicus Curiae

APPENDIX A

Members of the Coalition for the Free Exercise of Religion

The members of the Coalition for the Free Exercise of Religion include: Agudath Israel of America, The Aleph Institute, American Association of Christian Schools, American Baptist Churches USA, American Civil Liberties Union, American Conference on Religious Movements, American Ethical Union – Washington Ethical Action Office, American Humanist Association, American Jewish Committee, American Jewish Congress, American Muslim Council, Americans for Democratic Action, Americans for Religious Liberty, Americans United for Separation of Church & State, Anti-Defamation League, Association of Christian Schools International, Association of American Indian Affairs, Baptist Joint Committee on Public Affairs, B'nai B'rith, Central Conference of American Rabbis, Christian Church (Disciples of Christ), Christian Legal Society, Christian Life Commission, Southern Baptist Convention, Christian Science Committee on Publication, Church of the Brethren, Church of Jesus Christ of Latter-day Saints, Church of Scientology International, Coalition for Christian Colleges and Universities, Coalitions for America, Concerned Women for America, Council of Jewish Federations, Council on Religious Freedom, Council on Spiritual Practices, Criminal Justice Policy Foundation, Episcopal Church, Evangelical Lutheran Church in America, Friends Committee on National Legislation, General Conference on Seventh-day Adventists, Guru Gobind Singh Foundation, Hadassah – the Women's Zionist Organization of America, Inc., Home School Legal Defense Association, International

Association of Jewish Lawyers and Jurists, International Institute for Religious Freedom, Japanese American Citizens League, The Jewish Reconstructionist Federation, Justice Fellowship, Mennonite Central Committee U.S., Muslim Prison Federation, National Association of Evangelicals, National Campaign for a Peace Tax Fund, National Council of Churches of Christ in the USA, National Council of Jewish Women, National Council on Islamic Affairs, National Jewish Commission on Law and Public Affairs, National Jewish Community Relations Advisory Council, National Sikh Center, Native American Church of North America, Native American Rights Fund, North American Council For Muslim Women, People For the American Way Action Fund, Peyote Way Church of God, Rabbinical Council of America, Soka-Gakkai International-USA, Traditional Values Coalition, Union of American Hebrew Congregations, Union of Orthodox Jewish Congregations of America, Unitarian Universalist Association of Congregations, United Church of Christ – Office for Church in Society, United Synagogue of Conservative Judaism, Women of Reform Judaism – Federation of Temple Sisterhoods.